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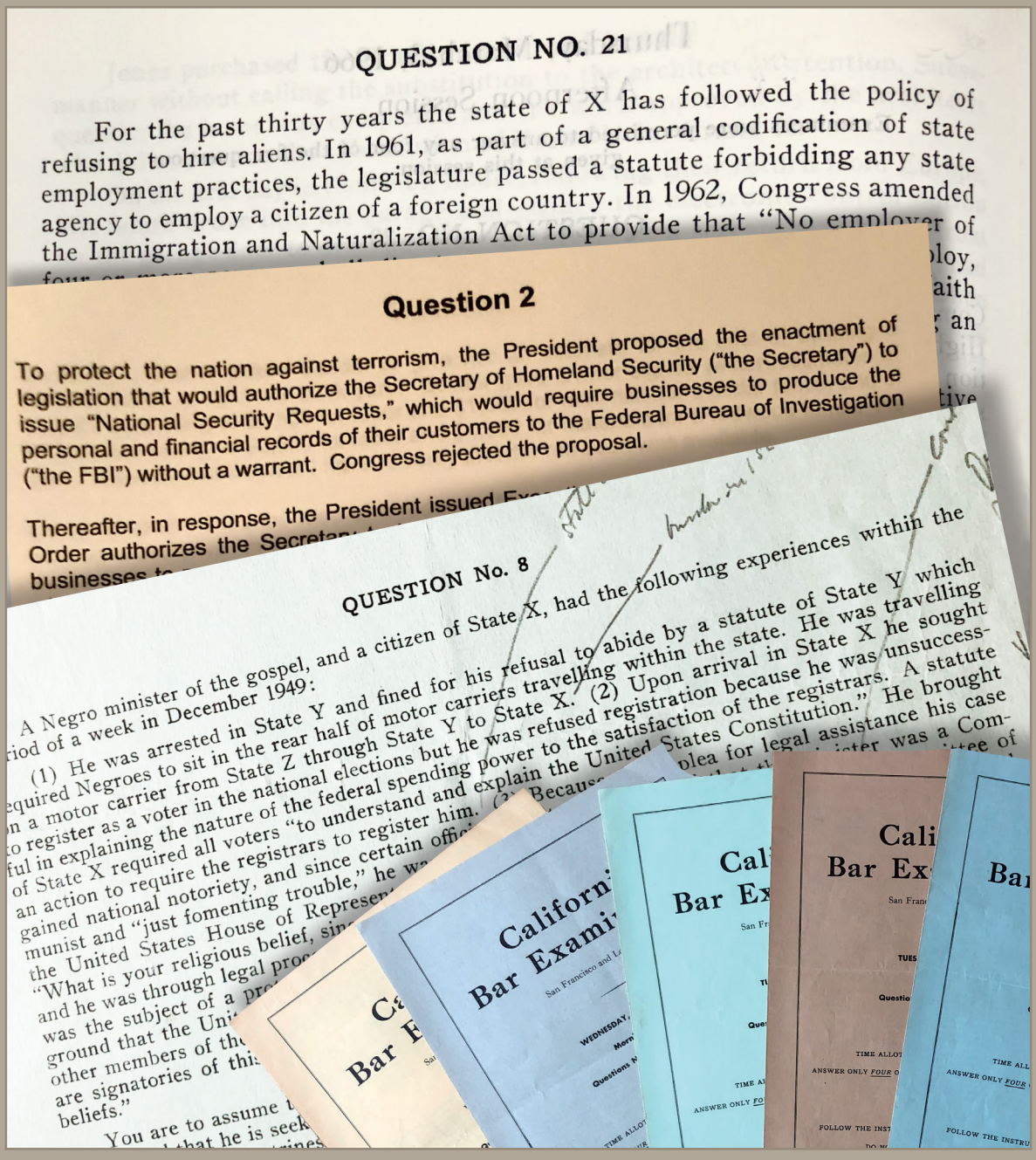
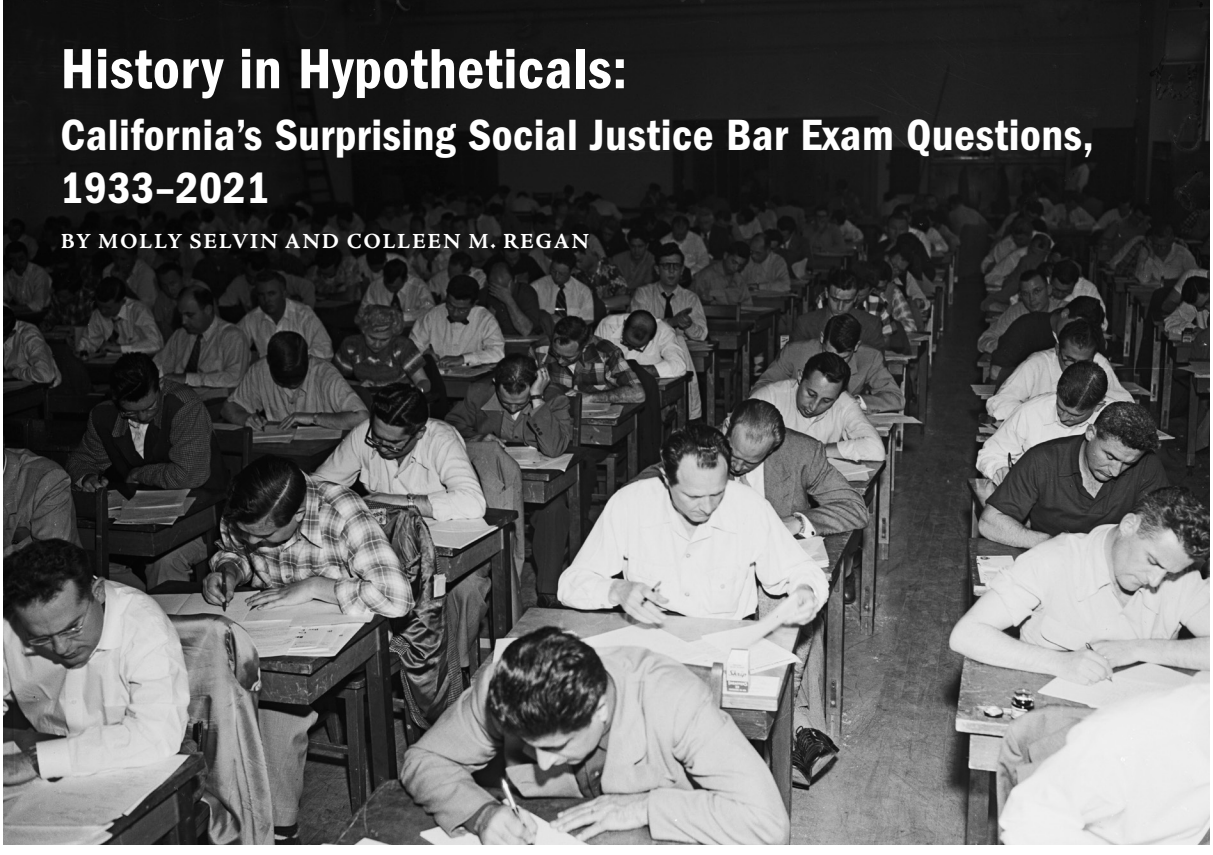


The Surprising Social Justice Questions on the California Bar Exam, 1933–2021

History in Hypotheticals:

California's Surprising Social Justice Bar Exam Questions, 1933–2021

BY MOLLY SELVIN AND COLLEEN M. REGAN



Taking the 1952 California Bar Exam. *Photo: University of Southern California Libraries, Los Angeles Examiner Photographs Collection, 1920–1961.*

The applicants who sat for the October 1947 California Bar Examination chose from among two dozen hypothetical questions. Along with questions involving disposition of a trust, the constitutionality of a proposed federal statute defining obscenity, and the barter of a cow for an "unsound" horse, Question 20 echoed cases that state and federal judges around the country already had on their dockets:

> P sues D in state court in [the state of] Magenta to enforce a restrictive covenant which forbids occupancy of certain land by a person not a member of the Caucasian race. The defendant is in part Negro and has bought the land . . . by himself and his family. The defendant argues that the 14th Amendment . . . prevents the enforcement of the covenant against him . . . [but] admits that the covenant is enforceable according to state law unless the 14th Amendment prevents its enforcement. What should the decision of the court be? Discuss.

Eight months later, the U.S. Supreme Court in *Shelley v. Kraemer*[1] held, as the hypothetical defendant "D" had argued, that racial covenants violated the Equal Protection Clause of the Fourteenth Amendment. *Shelley* combined cases from Missouri and Michigan, where state supreme courts had upheld covenants that attached to property (common in many states, including California) legally barring occupancy by non-white residents, including even by individuals who possessed title to that land.

Did California's bar examiners include Question 20 because they anticipated that the U.S. Supreme Court would rule as it did in May 1948? Did they pose this question because, in addition to demonstrating basic competency in the law, the examiners believed that lawyers have a responsibility to think broadly about equity and civil rights, issues newly resonant in the post–World War II years? We were curious.

This article explores the questions presented on California's bar exam over nearly 90 years, from August 1933 through July 2021. We set out to understand what subjects bar examiners decided were important to include on the test and how and why those subjects evolved over the decades. We were also curious about the extent to which those broad subjects and specific exam questions reflected changing societal mores and racial and gender relationships, both in their sometimes archaic language and the assumptions behind the hypothetical fact patterns. Quite a bit, it turns out.

Taken together, the exam questions inadvertently documented California's twentieth-century transition from a largely rural, agriculturally based economy to a state where booming cities gave rise to new legal problems like automobile accidents and dodgy elevators.

Most surprising to us, however, were the many questions tracking pressing legal and policy issues of the day including equality and the limits of free speech, association and religious expression. Probably not incidentally,

1. (1948) 334 U.S. 1.

many of the broadest and most thought-provoking questions on the bar appeared during the decades when previously unasserted constitutional rights were litigated and expanded in cases across the country, particularly involving women, racial minorities, and criminal defendants.

The stated goals of the bar examiners did not change over the decades — they have been to measure an applicant's ability to analyze facts, discern the relevant material from the immaterial, identify the points of law upon which the case turns, and then apply the law to the facts, reasoning in a logical manner from premises to a sound conclusion.[2] The unstated consensus has been that these are the essential abilities of a competent lawyer. However, we found that the style and content of the bar exam questions varied significantly over the years. For example, questions in recent decades retreated from the sweeping, and now long-settled, civil rights and equal protection fact patterns of the mid-twentieth century in favor of less potentially offensive, and thus less controversial, hypotheticals. Recent questions tended to be shorter, narrower in scope, and susceptible to more efficient and objective grading. Where the California bar exam will go in the future remains to be seen, but these older essay questions yield a fascinating picture of the past that is unlikely to be repeated.

Brief History of the California Bar Exam

Currently, the only way to obtain a license to practice law in California is by passing the bar examination. California was not the first jurisdiction to require aspiring lawyers to pass a test to practice their profession. That distinction lies with Delaware, which instituted an oral bar exam in 1763.[3]

Clara Shortridge Foltz. *Photo: Security Pacific National Bank Collection, Los Angeles Public Library Photo Collection.*

In 1878, Clara Shortridge Foltz, the first woman admitted to the California bar, was administered a three-hour oral exam after studying with a San Jose judge.[4] Foltz was initially barred from enrolling in law school due to her sex. She and her fellow suffragist, Laura de Force Gordon, sued and ultimately won the right for women to attend Hastings College of Law at the coeducational University of California. She had already fought for the right to take the bar exam because bar membership in California was limited to white men. Foltz promoted and drafted legislation, known as the "Woman Lawyer Bill," which replaced "white male" with "citizen or person." The bill was signed into law five months before she took the bar exam.[5]

Also beginning in 1878, attorneys in California could enter the profession just by graduating from Hastings, a practice known as the "diploma privilege." The privilege was created as an incentive to lure students to law schools, whose numbers had mushroomed in the years following the Civil War.[6]

Traditionally, and before creation of the diploma privilege, would-be lawyers apprenticed under a practitioner and then faced oral examination by a judge. Alternatively, those who wished to be attorneys "read" the law and then petitioned the Supreme Court for admission to the bar.[7] In California, "[b]y the early 1900s it was apparent that the wild west was attracting an increasing number of law students, and overworked judges began delegating the testing task to committees of attorneys."[8]

Early in the twentieth century, the ABA worked to standardize bar admission processes, which were inconsistent from state to state and frequently very low.[9] These

2. *See, e.g.,* "Essay Examination Instructions" from the July 1983 and February 2001 administrations of the exam.

3. The first written bar exam was administered in Massachusetts, in 1855. Jessica Williams, "Abolish the Bar Exam," *California Law Review Blog*, Oct. 2020, *https://www.californialawreview.org/abolish-the-bar-exam/* (as of Feb. 1, 2022).

4. Foltz read law books at the offices of Hon. C. C. Stephens. B. Mora, *The First Female Lawyer in California: Clara S. Foltz,* Contra Costa County Bar Association, Nov. 2016, *https://www.cccba.org/article/the-first-female-lawyer-in-california-clara-s-foltz/#author* (as of Apr. 30, 2022); *see also*, Barbara Allen Babcock, "Dedicating the Clara Shortridge Foltz Criminal Justice Center" (Spring/Summer 2003) *CSCHS Newsletter* 8, 13.

5. Mora, *The First Female Lawyer in California*.

6. Alfred Reed, *Training For The Public Profession of the Law,* New York: The Carnegie Foundation for the Advancement of Teaching, 1921, 265–66, *https://babel.hathitrust.org/cgi/pt?id=osu.32435023490311&view=1up&seq=7&skin=2021* (as of Apr. 13, 2022). At the time, Hastings was the only law school in California. "Diploma privilege" permitted graduates of certain law schools to practice law without taking a bar exam. Many states offered the privilege, and the practice reached its peak between 1879 and 1917. California abolished use of the diploma privilege in 1917 and the ABA denounced it in 1921. Wisconsin is the only jurisdiction that still recognizes the privilege, for graduates of Wisconsin law schools.

7. Kathleen Beitiks, "Admissions standards evolve across decades," in *Celebrating 75 Years,* San Francisco: State Bar of California, 2002, 9, *https://www.calbarjournal.com/Portals/1/documents/75th-Anniversary.pdf* (as of Apr. 20, 2022). Petitions typically included letters of reference and a list of the law books the applicant had studied. *Ibid*.

8. *Ibid*.

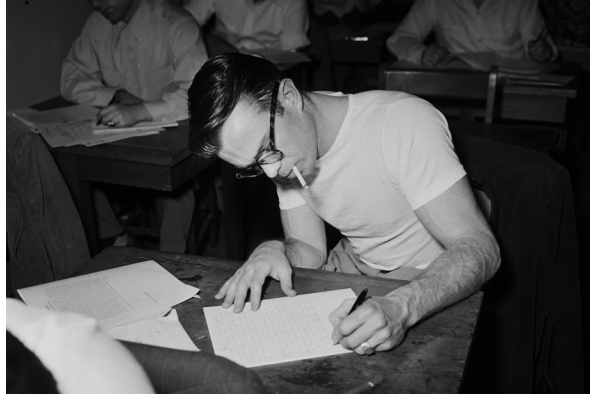
9. Prof. Margo Melli, "Passing the Bar: A Brief History of Bar Exam Standards," *Gargoyle,* Univ. of Wis. Law School (Summer 1990) 21, 3–5, *https://media.law.wisc.edu/m/ywq4n/gargoyle_21_1_2.pdf* (as of Apr. 13, 2022). The mid- to late-1800s saw the creation of boards and associations to license several professions, an effort to protect public health and safety as well as to manage competition. For example, the American Medical Association was founded in 1847, and the American Institute of Architects in 1857. *See* "AMA history," *https://www.ama-assn.org/about/ama-history/ama-history* (as of Apr. 30, 2022); National Council of Architectural Registration Boards, *NCARB 100, https://centennial.ncarb.org/beginning-of-licensure/* (as of Apr. 13, 2022).

concerns led the California Legislature, in 1919, to create the Board of Bar Examiners, originally comprised of three prominent attorneys from Northern California appointed by the California Supreme Court.[10] The state's first written bar exam was conducted in 1920, administered in Los Angeles and San Francisco. Of the 137 people who sat for the test, 88 applicants passed, and 49 failed.[11] One hundred years later, in 2020, one hundred times as many people (13,900) sat for the California bar.[12]

For decades, the format of the bar exam included three days of essay questions, given twice a year, in the spring and fall. Applicants could choose which 20 of 25 questions they wished to answer. Today, the exam consists of three parts, and is administered over two days: Day 1 consists of five mandatory 1-hour essay questions, and one 90-minute performance test, and Day 2 presents the Multistate Bar Exam (MBE), a 200 multiple-choice question test developed by the National Committee of Bar Examiners (NCBE), which is now employed in virtually every state.[13]

Who Wrote the Exam Questions, and What Were They Trying to Test?

California drafted the questions for its first (1920) written bar examination with a degree of thoughtfulness. According to the minutes of the December 2, 1919, meeting of the then-new Board of Bar Examiners, they surveyed bar associations from other states about their test question content. Each of the examiners submitted at least 40 questions and sample answers for one of the subjects to be tested on the inaugural exam. It is unclear who ultimately chose those original questions.[14]



Taking the California Bar Exam, April 1, 1952. *Photo: University of Southern California Libraries, Los Angeles Examiner Photographs Collection, 1920–1961.*

Shortly after its founding in 1931, the NCBE worked with states to help them improve their bar exam questions. The NCBE urged abandonment of short-answer questions that relied on memorization (such as "*What is evidence? List the kinds*" or "*Define the term substantial compliance*") in favor of essay questions typically seen on exams today — "i.e., a statement of hypothetical facts presenting interrelated legal problems and requiring an answer in the form of a short composition that analyzes the facts and discusses and interprets the applicable law."[15]

Bar examiners have long considered to be a key legal competency the ability to discern from a proposed situation important facts and points of law and reason to a sound conclusion. Yet, while there is consensus that this skill set is at or near the heart of being a lawyer, recent decades have seen both debate about how to assess "competency" and growing concern over whether the California exam has effectively, fairly, and equitably tested this ability. Professor Deborah Jones Merritt, who has written extensively on the knowledge and skills that new lawyers should possess to serve clients effectively, noted that "nobody thought about basic bar competencies for a long time."[16] Instead, the focus was on testing to theoretical topics that had become the established canon of law school education.

At the same time, some question writers seem to have had another goal in mind. Historically, law professors as

10. *Id*. at 9 and 25. The Board was later superseded, in 1939, by the 19-member Committee of Bar Examiners. *See https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Committee-of-Bar-Examiners*. (as of Apr.12, 2022). California was neither the first nor the last state to act. Nationally, the late 1800s saw a push to develop central boards of bar examiners with state-wide jurisdiction and by 1931, every state but Indiana had followed suit. *Id*. at 4.

11. *Beitiks,* "Admissions standards evolve across decades," in *Celebrating 75 Years*, 9.

12. Most of the contemporary examinees took the test on-line, due to COVID-19 pandemic restrictions. *https://annualreport.calbar.ca.gov/2020-annual-report/preface/* (as of Feb. 4, 2022).

13. Only Louisiana and Puerto Rico do not use the MBE. In July 2017, the California State Bar moved to the current two-day format. The change was prompted by research indicating that shortening the exam would not adversely affect the quality of the exam or the pass rate. The structure of the exam significantly changed in 1972 when California adopted the MBE. The number of essay questions dropped to 12 (of 15), to be answered over two days, with the MBE given on the third (middle) day. In 1978, the number of essay questions was reduced again, to 9. Patrick R. Dixon and Alan S. Yochelson, "Shhh . . . California Examinees May Be Sleeping In after Day Two of the Bar Exam," *The Bar Examiner*, June 2017, 5, *https://thebarexaminer.ncbex.org/article/june-2017/shhh-california-examinees-may-be-sleeping-in-after-day-two-of-the-bar-exam-2/* (as of Apr. 9, 2022). The Performance Test was introduced in 1983, and the number of essay questions was concomitantly reduced to six, in part to encourage law schools to include more clinical legal education in the curricula. *Id*. at 9.

14. *Beitiks,* "Admissions standards evolve across decades," in *Celebrating 75 Years*, 25.

15. *Id*.

16. Authors' interview with Prof. (Emer.) Deborah Jones Merritt, Moritz College of Law, The Ohio State University, Dec. 21, 2021. The first empirical studies of lawyer competence date from the 1970s. *See* Deborah Merritt and Logan Cornett, "Building a Better Bar: The Twelve Building Blocks of Minimum Competence" (Oct. 2020) *Institute for the Advancement of the American Legal System*, 7, 3, *https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar_pre_print.pdf* (as of Feb. 4, 2022).

well as practitioners and State Bar staffers contributed bar exam questions.[17] Law professors likely suggested questions on subjects they were addressing in class, Merritt told us. Before 1970 and particularly during the 1940s and 50s, constitutional law with respect to individual rights and criminal procedure was considerably less defined than in the decades since. The concept of "separate but equal," for example, was likely a topic in faculty lounges long before *Brown v. Board of Education*, so it is not surprising that it found its way onto the bar exam.[18]

Moreover, while lawyers may encounter few constitutional questions in their practice, it seems probable, from inclusion of some questions over the years, that some bar examiners believed that lawyers, as "custodians of the Constitution," should be at "the leading edge of the law," and required to think broadly about contemporary issues of fairness and justice.[19]

Our Methodology

The Berkeley Law Library houses the most complete collection of California State Bar Examinations we were able to access.[20] Over the course of several days, we looked at every available exam from 1933 to 2021, reading hundreds of essay questions.[21]

The questions that drew our attention were those that seemed to reflect societal attitudes of the day, major changes in state and federal law, and evidence of emerging shifts in both the law and society particularly along economic, political, racial, and gender dimensions. Unsurprisingly, we noted that questions probing for the same analysis appeared regularly — for example, asking test takers to sort out negligence in complicated workplace accidents or rights among family members with competing inheritance claims. Several hypotheticals reappeared almost verbatim over the years. Note that we do not claim ours is a comprehensive or rigorous statistical analysis. We picked exam questions subjectively — choosing what seemed interesting and revealing.[22]

We grouped our selected questions into broad (and often overlapping) categories including criminal law, First Amendment / free speech issues, wills and estates, equal protection / discrimination, commercial transactions and labor relations. We also flagged questions where the language in the hypothetical was glaringly pejorative — "Bum, an insolvent squatter" — or dated — for instance, the demise of several "elderly spinsters" set in motion complicated inheritance disputes well into the mid-twentieth century. Finally, we noted a few questions involving accidents or alleged crimes involving a chain of events so convoluted that they bordered on preposterous.

To draw some conclusions about how the bar exam seemed to reflect shifts in law and society, we informally, and quite broadly, "mapped" questions against legal decisions and broad changes and historical events in California and nationally.[23] We also spoke with scholars who write on the bar exam and lawyer competency. We reviewed copies of *The Bar Examiner*, a publication of the NCBE, looking from 1931–1985 for discussion of the constitutional and social-impact questions that are our focus. We found virtually none.[24]

What Did We Find?

Three broad themes emerged in the exam questions we review below. First, as we will detail, the questions

17. State Bar examiners still solicit questions and model answers from law professors along with practitioners, exam graders and other "qualified drafters." State Bar rules prohibit California law professors who submit questions from including those questions on their course exams for a time, so that professor's students are not advantaged. Authors' interview with Lisa Cummins, Principal Program Analyst, Examination Development, Office of Admissions, State Bar of California, Jan. 6, 2022.

18. Interview, Merritt, Dec. 21, 2021.

19. *Ibid*.

20. The authors are extremely grateful to Librarian Ramona Collins for allowing us to examine these materials. This project originated in Molly's pandemic garage cleaning with discovery of all the question booklets that comprised the April 1950 California Bar Examination, including pencil annotations in those booklets by her late father, Paul P. Selvin, who passed the exam that year. Selvin went on to found an appellate practice in Los Angeles; he represented numerous publications, progressive organizations and writers on First Amendment matters, and was general counsel to the Writers Guild of America, West for 25 years. We dedicate this article to his memory.

21. Questions for a handful of morning or afternoon sessions are missing from Berkeley's collection. Because we were interested in the form and content of the essay questions, for the exam administrations that included the MBE (since 1972) and the Performance Test (since 1983), we considered only the essay questions for those exams.

22. There are many dozens of questions we have not discussed. For example, while estate planning practitioners make up only about 5 percent of California's lawyers, more than half of the of exams contained an essay question relating to trusts and wills. *See, e.g.,* Summary Results of Five-Year Attorney Survey 2017, State Bar of California, *https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000017473.pdf* (as of Apr. 20, 2022); SmartBar Prep Frequency Analysis 2021, *www.smartbarprep.com (as of Apr. 20, 2022)*. Questions about community property also made up a large percentage of the questions. The questions on these topics tended to consist of minor variations on the same theme: H & W, Husband and Wife, or Hank and Wilma married or co-habited; they had children or other heirs; one made a trust, or died, or they divorced; one remarried: the final question was "who inherits?" The only real difference was in the nature of the assets to be divided, which frequently included valuable art, jewelry, stocks, or land.

23. Richard Neustadt and Ernest May urge policy makers to use a version of this technique to better understand the motivations of their colleagues and adversaries, and they urge historians to employ it as a tool to more honestly appraise historical figures. *See* Neustadt and May, *Thinking in Time, The Uses of History for Decision Makers*, New York: The Free Press, 1986, Chs. 9, 10.

24. *See* Wesley A. Sturgis, "Should Bar Examinations Include Optional Questions?" *The Bar Examiner*, June 1951, 125–30.

constitute a prism through which we can view nearly a century of dramatic change in law and culture in California as well as nationally. Several questions tackled then-controversial issues directly, for example, asking what the U.S. Supreme Court "should" do about racial discrimination on buses and in housing. In other questions, concerns about First Amendment or other constitutional rights appeared in hypotheticals focused on more pedestrian tort or contract disputes. Test takers may have felt these questions aimed to divert them. However, reading them today yields an unexpectedly rich sense of the contemporary political and legal debate.

Second, as we noted above, many of these exam questions required aspiring lawyers to think broadly about fairness and justice. Beginning at least in the 1940s, racial and gender discrimination, the rights of criminal defendants, and environmental pollution were matters of intense debate, political action and even violent public protest, pushing the boundaries of settled law. Although these kinds of questions were likely an extension of current law classroom discussions, they also may have been intended to remind new lawyers of their responsibility as "custodians of the Constitution."

Third, the language and fact patterns illustrate Californians' social and economic maturation. Hypothetical disputes over the sale of antelope pelts or delivery of a load of prunes early in the century gave way, in recent decades, to questions involving housing development, shopping malls, toxic pollution and golf courses. The "elderly spinsters" who appeared in questions from the 1930s and '40s gave way to "older women." Shoplifters were no longer named "Jack Deft," and fictitious business owners and executives often had female names.

The Struggle for Equality

Discrimination was not the most common subject on California's bar exams. But beginning in the 1940s, questions involving equal protection / discrimination in its manifold twentieth century forms — involving race, religion, gender, citizenship, and political belief — arose remarkably often. The fact patterns closely tracked the civil rights debates of the day, often anticipating, sometimes by years, milestone state and federal legislation and precedential court rulings. To us, these were among the most thought-provoking and even poignant questions.

Reading these questions today underscores the blatant discrimination of past decades, the urgency of the quest for equality, and the violence with which pleas for equality were often met. Ordinary Americans sought fair treatment in workplaces, from banks, landlords and realtors, in restaurants and hotels, and on buses and trains. They wanted to marry, raise a family, pursue a career, or practice their faith without being thwarted or stigmatized. Issues of equality were continuously debated in the newspapers and on radio, and in state capitals and Congress. It is no surprise that they also found their way into law school lecture halls and lounges — and onto the bar exam. They prodded test takers as well as lawmakers, judges and average citizens to think about in what ways American society and law should evolve.

The 1957 Civil Rights Act was the first of a string of landmark federal laws[25] responding to the mid-century movement for equality, most prominently by African Americans and Mexican Americans, by prohibiting discrimination in education, public accommodations, voting, employment and housing. California adopted its own antidiscrimination laws, often earlier and more protective than the federal ones.[26]

In some discrimination questions, most notably those involving public accommodations issues, test takers were told to answer "according to California law." In others, the question referred to litigation then before or likely to be before the U.S. Supreme Court and asked how that court "might" or "should" rule in the absence of precedential ruling on the topic. We regard these instructions as more evidence that bar examiners expected new lawyers (as was then prevalent in law schools and in society at large) to think about broad issues of social justice.

Racial discrimination

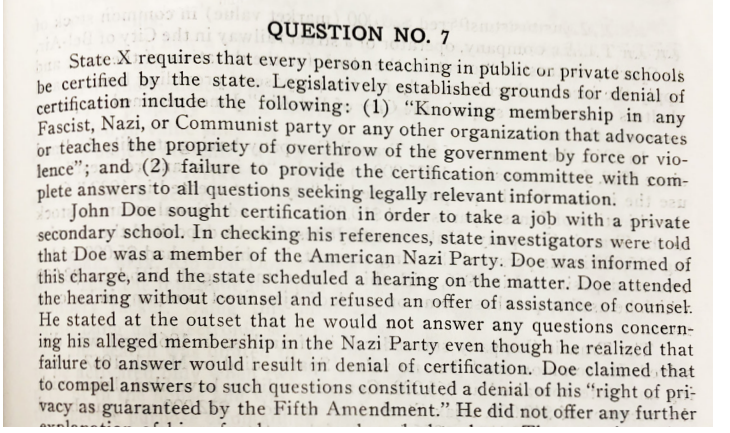
The most common group of discrimination questions we found centered on race. In just the seven years between 1946 and 1953, ten exam questions appeared involving African Americans who sought access to schools and

25. The 1957 act allowed federal prosecution of anyone who tried to prevent someone from voting and created a commission to investigate voter fraud. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 followed. The Americans With Disabilities Act, prohibiting discrimination in employment and by governments, private businesses and unions on the basis of disability, was enacted in 1990. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the bases of race, color, religion, sex, or national origin. The federal Fair Housing Act, adopted in 1968, prohibits discrimination in the sale, rental or financing of hosing based on race, religion, national origin, sex, (and as amended) handicap and family status.

26. The California Fair Employment Practices Act (FEPA) of 1959 barred discrimination in employment on the bases of race, religious creed, color, national origin, and ancestry. The Unruh Act of 1959 prohibited discrimination in housing and public accommodations on grounds of "race, color, religion, ancestry, or natural origin" by "business establishments of every kind." In 1963, the Legislature passed the Rumford Fair Housing Act, prohibiting housing discrimination in all rental properties of four or more units based on of race, color, religion, national origin, and ancestry. Then, in 1980, the FEPA and the Rumford Fair Housing Act were combined and renamed the Fair Employment and Housing Act (FEHA). The range of the FEHA, covering employers of five or more persons, is far more extensive than the federal legislation, now covering other protected classifications, including sexual orientation, marital status, medical condition, military or veteran status, national origin, ancestry, disability, genetic information, requests for protected leaves, and age (over 40).

universities, housing, public accommodations, employment, or to marry or inherit. Most hypotheticals asked test takers to address the issues of discrimination and equal protection directly rather than as the background for a question on another subject.

Efforts to end or at least to address racial discrimination that have roiled this country since its founding gained new urgency beginning in the late 1940s. Black WWII veterans who had fought fascism abroad felt they deserved respect and to share in the postwar economic boom at home. Others simply sought a fair shake and the end to the crushing Jim Crow regime firmly in place across the South. Moreover, insidious but still-pervasive prejudice constrained opportunities in California and other states for Latinos and Asian Americans as well as African Americans, and not infrequently resulted in violence against them.



QUESTION NO. 7

State X requires that every person teaching in public or private schools be certified by the state. Legislatively established grounds for denial of certification include the following: (1) "Knowing membership in any Fascist, Nazi, or Communist party or any other organization that advocates or teaches the propriety of overthrow of the government by force or violence"; and (2) failure to provide the certification committee with complete answers to all questions seeking legally relevant information.

John Doe sought certification in order to take a job with a private secondary school. In checking his references, state investigators were told that Doe was a member of the American Nazi Party. Doe was informed of this charge, and the state scheduled a hearing on the matter. Doe attended the hearing without counsel and refused an offer of assistance of counsel. He stated at the outset that he would not answer any questions concerning his alleged membership in the Nazi Party even though he realized that failure to answer would result in denial of certification. Doe claimed that to compel answers to such questions constituted a denial of his "right of privacy as guaranteed by the Fifth Amendment." He did not offer any further

August 1968 Bar exam hypothetical positing a Fifth Amendment right of privacy.

Intermarriage questions appeared occasionally in the 1930s through the late 1940s, when the California Supreme Court held that the state's ban on intermarriage was unconstitutional under the Fourteenth Amendment.[27] That ruling came almost 20 years before the U.S. Supreme Court invalidated all state intermarriage bans.[28]

Intermarriage also seems to have been one area where race provided context for questions about inheritance or other issues rather than the legitimacy of discrimination itself. Typical is a 1935 question[29] that asked test takers to sort out the distribution of "A's" estate. Potential heirs included his illegitimate (and presumably white) son, his "mulatto" wife, "Y," and his sister's child, whom A had formally adopted (also presumably white). To complicate matters further, A and Y had married in Mexico, to deliberately evade California's ban on interracial marriages. (Mexico did not prohibit such marriages.)

Questions involving housing covenants that explicitly barred non-Caucasians from owning or renting property required test takers to wrestle head on with questions of fairness and equality. Recall the 1947 hypothetical cited at the outset of this article in which "P," resident of the fictional state of "Magenta," sought to enforce a restrictive covenant against "D," who is "part Negro." The question noted that "the defendant admits that the covenant is enforceable according to the state law unless the Fourteenth Amendment prevents its enforcement. What should the decision of the court be?" Bar examiners and test takers probably knew that the U.S. Supreme Court was already considering *Shelley v. Kraemer*,[30] and the following year, in 1948, the court held that state court enforcement of such covenants did violate the equal protection clause of the Fourteenth Amendment.[31]

Questions involving African Americans who sought entry to clubs or restaurants, or to travel freely on public buses and other conveyances appeared regularly through the 1950s. An April 1950 hypothetical — convoluted and, frankly, improbable — is remarkable for how it so clearly mirrored the growing defiance by African Americans of Jim Crow segregation and voter suppression. Five years before Rosa Parks refused to give up her bus seat for a white passenger, a hypothetical "Negro minister" was arrested and fined "for his refusal to abide by a statute of State Y which required Negroes to sit in the rear half of motor carriers." The minister, who was traveling to "State X" (where he presumably resided), sought to register to vote there in the upcoming national election. He was refused because he could not explain "the nature of federal spending power to the satisfaction of the registrars," prompting him to sue those registrars. Because his case attracted "national notoriety," and since "certain officials of State X declared that the minister was a Communist and 'just fomenting trouble,' "he was ordered to

27. *Perez v. Sharp* (1948) 32 Cal.2d 711.
28. *Loving v. Virginia*. (1967) 388 U.S. 1.
29. Sept. 5, 1935, Ques. 29.
30. (1948) 334 U.S. 1.

31. Of course, white residents in California or "Magenta" did not need legal covenants to exclude non-white residents. The *Shelley* decision notwithstanding, real estate agents continued to refuse to show available properties in white neighborhoods to prospective Black or brown homeowners, and landlords refused to rent to them. Those few residents who did manage to move into white communities often faced intimidation and even violence from their new neighbors. Such practices, sadly, continue. Sam Fulwood III, "The United States' History of Segregated Housing Continues to Limit Affordable Housing," Center for American Progress, Dec. 15, 2016, *https://www.americanprogress.org/article/the-united-states-history-of-segregated-housing-continues-to-limit-affordable-housing/* (as of Apr. 2, 2022). The renowned African American architect Paul R. Williams (1894–1980) designed the Stanley Mosk Courthouse in Los Angeles, the iconic Polo Lounge in the Beverly Hills Hotel, and many Southern California homes, including for celebrities including Lucille Ball, Frank Sinatra and Bert Lahr. Yet racial covenants barred Williams from living in the neighborhoods where the homes he designed were built. *See* Anne M. Russell, "Tracing the Legacy of Legendary Architect Paul Williams," *Golden State* [no date], *https://goldenstate.is/tracing-the-legacy-of-legendary-california-architect-paul-williams/* (as of Nov. 27, 2021).

appear before a Congressional committee investigating Communism.

"You are to assume," the question asked, "that the minister's cases are properly before the Supreme Court of the United States, and that he is seeking relief from judgments against him in the courts below. Discuss the legal principles, or the doctrines, which the Court will consider, and predict whether or not the Court will hold for or against the minister."[32]

Other questions seemed to anticipate *Brown v. Board of Education* and its successor cases.[33] In one from 1953, public schools in "State X" had segregated white and Black students until "the U.S. Supreme Court held that this was unconstitutional." State X then passed legislation giving "all its schools to a private corporation" that continued to segregate students. "An appropriate case is now being heard by the U.S. Supreme Court wherein colored persons challenge the constitutionality of the state action, and the constitutionality of the action of the private corporation." Decide the two cases, the question asked, "giving reasons and principles and analogies involved."[34]

A 1966 question addressed housing segregation, then the subject of protest in Berkeley[35] and likely other university communities, as well as the First Amendment rights of campus picketers. In the question, "U," a large state university with insufficient dormitory accommodations, maintained a housing bureau to help students find off-campus housing. The housing bureau maintained two lists of public and private accommodations — one available to all students regardless of race, and a separate list of private homes that would rent to only white students. Accommodation in private homes was not subject to regulation. The local NAACP insisted that U's practice of distributing the "whites only" list of private accommodations was both legally and morally wrong and sought to picket the administration building. Permission was denied, but picketers gathered anyway, disrupting traffic. A state court issued a temporary restraining order against further picketing and the NAACP and three students sought a declaratory judgment and injunction stopping U from listing any housing facilities that discriminated on the basis of race. The test taker was asked to determine the correct result and state why, both as to the housing issue and the picketing.

As noted above, the federal Fair Housing Act, prohibiting race discrimination, was not enacted until 1968, two years after this fact pattern was presented to California bar examinees. Yet, California's Rumford Fair Housing Act had become law three years earlier. It is hard not to imagine that the bar examiners were inviting the test takers to apply the California anti-discrimination rule to the fictional State U, thus agreeing with the NAACP that the U's white-only housing list was both legally and morally wrong.

A 1972 exam question[36] anticipated the "reverse discrimination" claim relating to university admissions that arose in *Regents of the University of California v. Bakke*.[37] The bar question supposed that the medical school of the "State University of State X" accepted 100 students to each of its entering classes. The fictional school required that at least 10 percent of each entering class must be members of "minority groups" and limited the admission of non-residents. The plaintiff, "Brutus," was not a member of a minority group and was a non-resident but was among the best qualified applicants. Yet, Brutus was rejected and sued the Regents of the State University in federal court to gain admission to the medical school. Test takers were asked "What result and why?"

The circumstances of the *Bakke* case were, in some respects, congruent with the bar exam hypothetical. The UC Davis Medical School, in *Bakke,* accepted 100 students each year and ran two separate admissions programs — one for regular admissions, and one for special (economically and/or educationally challenged and minority) admissions. Like Brutus, Bakke's admission scores were higher than many of the applicants accepted under the special admissions program. And, like Brutus, Bakke was rejected and subsequently sued for admission and a declaration that the admissions program was unconstitutional.

Interesting as these parallels are, the bar exam hypothetical could not have been based on the facts of *Bakke*: Allan Bakke did not apply to medical school for the first time until a year *after* the July 1972 bar exam question appeared.[38] But affirmative action was already the subject of heated national debate as well as in law school classrooms and, no doubt, among law faculty.

32. Apr. 1950, Ques. 8.

33. (1954) 347 U.S. 483. *See also*, *Brown v. Board of Education of Topeka* (1955) 349 U.S. 294, and *Brown v. Board of Education*, 892 F.2d 851 (10th Cir. 1989).

34. Oct. 7, 1953, Ques. 24. Questions centered on racial discrimination continued to appear through 1985; several addressed where a (non-white — in one instance a Native American who was killed in the Vietnam War) person could be buried (Mar. 1970, Ques. 6), whether parents of one race could adopt a child of another (Aug. 1971, Ques. 2), and in one instance, discussed below, "reverse discrimination" in graduate school admissions (July 1972, Ques. 8).

35. Aug. 1966, Ques. 16. Beginning in the late 1950s and continuing through the mid-1960s, several reports, by Boalt (now Berkeley Law) students and Berkeley activist groups including the local NAACP, documented ongoing, blatant housing discrimination against Asians and African Americans, and called on local realtors and public officials to end the practice. One study found discrimination within a block of campus, including in private housing advertised through the university. Douglas Henry Daniels, "Berkeley Apartheid: Unfair Housing in a University Town," (2013) 3 *History Research* 321, 327–30.

36. July 1972, Ques. 8.

37. (1978) 438 U.S. 265.

38. Bakke applied to the medical school at the University of California at Davis in 1973 and 1974 — and was rejected both times.

Legal scholars and political activists were surely aware of other challenges in the early 1970s to similar graduate school admissions processes. Notably, in *DeFunis v. Odegaard,*[39] which made it to the U.S. Supreme Court two years before *Bakke,* a white plaintiff had challenged an admissions policy of the University of Washington School of Law, which preferred some minority candidates with lower admissions scores over white candidates with better scores. The original suit that led to the *DeFunis* decision was filed in a Washington State trial court in 1971, the year before the 1972 question appeared on the California bar exam.

Religious discrimination

The second most prevalent kind of discrimination mentioned in the exam questions centered on conduct against individuals or organizations engaged in the free exercise of religion. These questions, which overlap in category to some extent with those involving First Amendment / free speech rights,[40] appeared from the 1940s until as recently as 2014. Fact patterns involved the application of child labor laws to minors distributing religious materials, the constitutionality of mandatory prayer in public schools, and taxation of the property of religious institutions. Also mentioned were religious discrimination in adoptions and military assignments, whether holding a graduation ceremony on the Sabbath when the valedictorian could not attend due to religion was illegally discriminatory, a battle between a city and a church over land use, and a ban on neopagan symbols in a public seasonal display.[41]

The early questions often noted that the issue at the heart of the hypothetical was before the U.S. Supreme Court and asked test takers how the court might rule.[42] Later questions asked what arguments the appellant might make in support of its case and whether those arguments were likely to succeed.

Gender discrimination

The first exam question we found mentioning gender discrimination was on the February 1974 exam and the last was on the October 2020 exam.[43] Most involved women subjected to sexual harassment or quid-pro-quo situations in employment. One such question, from 1974, was spectacular in its audacity — the audacity of the female plaintiffs, that is.[44] It posited a manufacturing company (Dinaco) whose stock was publicly traded, and a nonprofit called Women on the March (WOM). Dinaco's board of directors rejected a request by WOM to revise its employment policies to comply with a recently enacted federal statute granting equal employment rights to women. When the board refused, WOM sued and won $2 million in damages, trebled under the statute to $6 million, against Dinaco on behalf of all women employees.

Taking the California Bar Exam, April 1, 1952. *Photo: University of Southern California Libraries, Los Angeles Examiner Photographs Collection, 1920–1961.*

Not content with that victory, WOM purchased Dinaco stock and then sought to bring (a) a shareholder derivative action against the directors, forcing them to repay to Dinaco the $6 million it had paid to the WOM, and (b) an injunction requiring the next proxy statement to propose, for a vote at the next annual meeting, that the officers and directors be required to take affirmative action to redress past injuries resulting from gender discrimination and that those officers and directors responsible for the past discriminatory practices not receive any bonus. The test-taker was asked to advise WOM on its possible new lawsuit.[45]

Another gender discrimination fact pattern describes a man who claimed he did not make the cheerleading squad of the public university solely because he was male.[46] In another question, a female police officer alleged failure to promote because she was a woman.[47]

39. (1974) 416 U.S. 312. The U.S. Supreme Court dismissed the appeal as moot because DeFunis had been provisionally admitted to the law school and, by the time of the decision, was about to graduate.

40. See First Amendment / free speech discussion below.

41. Aug. 1971, Ques. 22 (adoption); Feb. 2011, Ques. 2 (military assignments); July 1985, Ques. 2 (graduation ceremony on Sabbath); Feb. 2002, Ques. 5 (land use); and Feb. 2014, Ques. 5 (neopagan display).

42. *Cantwell v. Connecticut* (1940) (requiring a state permit for religious soliciting was unconstitutional); *Engle v. Vitale* (1962) (mandatory prayer in school violated Establishment Clause); *Lemon v. Kurtzman* (1971) (3-pronged test for determining whether a statute violates the Establishment Clause).

43. Feb. 1974, Ques. 3; Oct. 2020, Ques. 1.

44. Feb. 1974, Ques. 3.

45. Interestingly, by 1974, the National Organization for Women (NOW), founded in 1966, had filed lawsuits throughout the country seeking to enforce equal rights for women in the workplace.

46. Feb. 2003, Ques. 5. The actual question was whether the plaintiff was entitled to proceed *in forma pauperis,* not whether he had suffered discrimination.

47. Feb. 2005, Ques. 4. The actual questions involved potential ethical violations by the attorneys involved in the lawsuit

By the time these questions were posed, countless cases involving similar gender discrimination had been decided by California and federal courts all over the country; the issue was no longer new.

Citizenship discrimination

A number of questions, clustered between 1935 and 1977, involved discrimination against non-citizens. In these questions, test takers were asked to assess the constitutionality of statutes that barred "aliens" from obtaining a license to operate a pool hall, in one case, and of "working for a public contractor" and "getting a job as a waiter" in two others. Another question asks the examinee whether a state policy not to hire "aliens" was enforceable when (according to the question) in 1962, Congress had amended the Immigration and Naturalization Act to forbid discrimination in employment on the basis of foreign citizenship.[48] Although the Civil Rights Act of 1964 declared that discrimination in employment on the basis of "national origin" is illegal, that act, which became law soon before the exam question appeared, bars discrimination based on citizenship only if citizenship is a pretext for national origin discrimination. California's Fair Employment & Housing Act of 1959, which also prohibits discrimination in employment on the basis of national origin or ancestry, is interpreted in a similar manner.[49] It appears that the test drafters were asking examinees to imagine a world where citizenship discrimination was absolutely prohibited.

The Limits of Individual Freedoms

Along with the landmark decisions on racial discrimination, much of the U.S. Supreme Court's notable mid-century jurisprudence related, either explicitly or implicitly, to First Amendment freedoms of religion, speech/expression, the press, assembly, and to petition the government for redress of grievances.

Between 1931 and 1974, the high court dramatically expanded press freedom by, for example, limiting prior restraint, protecting confidential sources, and shielding publications by raising the bar for defamation claims.[50] In 1941, the high court issued a seminal decision holding that the government could impose reasonable "time, place, and manner" restrictions on the right to assemble.[51] In 1962, school-sponsored prayer was held to violate the Establishment Clause.[52] In 1969, the wearing of armbands by school students to protest the Vietnam War was held to be protected symbolic speech,[53] and in 1989, the high court recognized that restrictions on flag burning violate free speech.[54]

As was true with respect to the Fourteenth Amendment–related equal protection / discrimination questions we discussed above, fact patterns in California bar exam questions involving First Amendment issues mirrored major social and political flashpoints during these decades. Test takers were asked, for instance, to grapple with questions of freedom of expression (the limits of public political speech, including speech advocating riot or violent overthrow of government), religion (the use and distribution of religious texts in public schools, conflicts between child labor laws and the distribution of religious material by children; whether teachers can read from the Bible despite state laws barring sectarian texts), freedom of assembly (permits for meetings in public parks or parades on public streets), and freedom of conscience (college scholarships limited to veterans who took a loyalty oath), as well as refusal of the state to certify as teachers members of the Fascist, Nazi or Communist parties. The frequency of First Amendment questions on the California exam peaked in the 1960s.

These questions often raised First Amendment issues indirectly, as the backdrop to questions that actually focused on another issue entirely, such as torts or contracts. For example, multiple questions between the early 1940s and the mid-1960s featured public officials, academics, and other individuals who were accused of Communist sympathies or affiliation. In each such hypothetical, the allegation was revealed as false or unproved, and test takers were directed to evaluate the resulting libel, defamation or tort claims rather than the issue of free association.

In a 1964 question,[55] "State X" was considering legislation to "control subversive activities on college campuses." "Tyson," a public information officer for the state police, disregarded his department's policy of not commenting on pending legislation by giving a speech in favor of the measure. Separately, Tyson heard from a reporter that "Smith," the state treasurer, had been on campus at the time of a Communist meeting. Tyson

and an evidence question, not whether there was gender discrimination.

48. Mar. 1966, Ques. 21. The Immigration and Naturalization Act of 1965, which abolished the National Origins Formula for immigration quotas, had the effect of removing *de facto* discrimination by immigration authorities against admitting to the U.S. people from places other than Northern Europe.

49. *https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/10/Immigration-Rights-Fact-Sheet_ENG.pdf* (as of May 15, 2022).

50. *Near v. Minnesota* (1931) 283 U.S. 697 (prior restraint); *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 and *Curtis Publishing v. Butts* (1967) 388 U.S. 130 (actual malice required to prove defamation of public figure); *Branzburg v. Hayes* (1972) 408 U.S. 665 (protection of confidential sources); *New York Times Co. v. United States* (1971) 403 U.S. 713 (prior restraint [Pentagon Papers case]); *Nebraska Press Association v. Stuart* (1976) 427 U.S. 539 (gag order in a criminal trial).

51. *Cox v. New Hampshire* (1941) 312 U.S. 569.

52. *Engle v. Vitale* (1962) 370 U.S. 421.

53. *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503.

54. *Texas v. Johnson* (1989) 491 U.S. 397.

55. Aug. 1964, Ques. 15.

mentioned this in his speech, implying that Smith had attended the Communist meeting. But Tyson was wrong and when he heard about Tyson's erroneous statement, Smith became angry and pressured a bank where Tyson had applied for a high-paying job to hire a candidate other than Tyson. At the end of this convoluted fact pattern, the question asked: "May Smith recover general damages against Tyson? May Tyson recover damages against Smith? Discuss."[56]

Apart from the question of damages, the fact pattern in this and similar questions[57] indicates that fears of "subversive activity" remained salient at least through the mid-1960s as did concerns about the authority of the state (or an employer) to restrict expression. We also note that none of the questions that we found directly asked test takers to discuss the extent to which First Amendment guarantees of freedom of association should extend to membership in or affiliation with subversive groups such as the Communist Party. Such, apparently, was the lingering shadow cast by the mid-century Communist witch hunts.

By contrast, the bar exam directed applicants to "decide" other First Amendment issues. Typical is a 1966 question centered on the limits of speech in the context of public meetings. The question assumed an ordinance that required permits for all public meetings held in city parks.[58] Two organizations — the "United Council Against Discrimination" (UCAD) and the "White Klans of America" — applied for permits. The request from UCAD was granted and that of the White Klans was denied. Both groups went ahead with their meeting in the same park on the same day. The Klan leaders were charged and convicted of holding a meeting without a permit, while the anti-discrimination folks spoke in favor of legislation that would ban "fascist hate groups like the White Klans." Scuffles broke out in the crowd. The UCAD speaker was arrested and later convicted of disorderly conduct. Examinees were asked to assume the case reached the U.S. Supreme Court, and then to address "the issues" and determine the "the result in each case." Clearly, the extent of "time, place and manner" restrictions on speech were still live topics 25 years after *Cox v. New Hampshire*.

As the Vietnam War ground on during the 1970s, bar exam questions, unsurprisingly, asked about the speech and expression rights of anti-war protestors,[59] including flag burners[60] and anti-draft advertisers in a state-funded student newspaper.[61] The fact patterns of these questions surely reflected civic activities of the times, but some also anticipated legal rulings not yet made. For example, in 1978, when the California exam posed a question about the constitutionality of a statute barring flag desecration,[62] the law on this issue was unsettled; the U.S. Supreme Court would not hold that flag burning was a form of protected speech for another 11 years.[63]

In the 1980s, California bar exam questions probed limits on collective political action by feminists and anti-war groups. One involved a feminist coalition that picketed a store because of its sexist advertising.[64] Another asked whether a student organization protesting government defense spending had the right to distribute literature on a public street and at a private shopping center.[65]

First Amendment questions since 2000 have focused less on free expression by individuals, and more on the power of local governments to regulate commercial and political speech, such as a city's anti-smoking initiative that banned advertising of tobacco products on billboards;[66] or whether an anti-immigrant group should be permitted to post an English-only flyer on a public bulletin board, in violation of a city's requirement that all postings be in both English and Spanish.[67]

From Indigent Counsel to Political Assassinations

Criminal law questions have appeared on California bar exams far less frequently than have those involving civil matters. However, as with other topics, the questions put to test takers often anticipated or reflected ongoing national debates that, years later, resulted in landmark U.S. Supreme Court rulings.

Most of the fact patterns probing knowledge of criminal law involved some permutation of Fourth Amendment search and seizure law.[68] For example, in a May 1971 question, a warrant to search an apartment and a house was issued in reliance on information that "Smith" was a drug dealer and was expecting a large

56. Interestingly, three years earlier, the California Court of Appeal had reiterated in a seminal case the existence and parameters of the tort of interference with prospective economic advantage. *Zimmerman v. Bank of America* (1961) 191 Cal.App.3d 55.

57. *See*, Oct. 6, 1941, No. 28, Oct. 4, 1951, No. 3, and Mar. 14, 1956, No. 19.

58. Aug. 1966, Ques. 6.

59. Mar. 1970, Ques. 20; Aug. 1971, Ques. 4.

60. Feb. 1978, Ques. 10.

61. Feb. 1976, Ques. 12.

62. Feb. 1978, Ques. 10.

63. *Texas v. Johnson* (1989) 491 U.S. 397.

64. July 1982, Ques. 3.

65. July 1986, Ques. 2.

66. Feb. 2007. Ques. 5.

67. Feb. 2012, Ques. 2.

68. In numerous cases decided every term since the 1950s, the U.S. Supreme Court defined and refined the limits of Fourth Amendment protections against unreasonable search and seizure, including warrantless arrests, probable cause, harmless error, custodial searches, confidential informants, the exclusionary rule, and exigent circumstances.

shipment.[69] In executing the warrant, officers searched a garage that was not covered by the warrant, and also searched the defendant's pockets, and found marijuana in both places. The test taker was asked what issues could be raised in an attempt to gain acquittal for Smith on charges of possession of marijuana. In other cases, such as one from February 1972, evidence was obtained from a student's locker without a warrant.[70] Although these questions post-dated the landmark United States Supreme Court case of *Mapp v. Ohio*,[71] the limits of a legal Fourth Amendment search were still evolving.

Lack of counsel was another early and recurring concern. For instance, the October 1948 exam[72] presented "Jack Deft," who lingered at the jewelry counter in a department store, "examine[d] a ring in a display box," and as the salesman turned his back, pocketed the ring in the raincoat he carried on his arm. When a store detective approached, "Deft [threw] his raincoat on the floor and [ran] out of the store." He compounded his trouble by snatching the purse of a woman he encountered blocks away.

Deft was arrested for both offenses. At his preliminary hearing, he informed the judge that he could not afford a lawyer, asking for one to be appointed. "The court inform[ed] Deft that no public funds [were] available for that purpose." The grand jury indicted Deft for theft of the ring and robbery of the woman.

"[Y]ou are assigned to prosecute Deft," the question went on. "Bearing in mind that even if you convict Deft in the trial court, he may ultimately receive the aid of counsel to appeal his case, what defenses (and arguments on appeal) would you anticipate and how would you meet them?"

The issue again arose on the 1956 bar exam in a hypothetical involving "Snow," a morphine addict, who was indicted for forgery. He appeared at his state court trial without counsel, pleaded guilty and was sentenced to ten years in prison. "After leaving the courtroom, he asked the district attorney and sheriff if he could talk to a lawyer and was told it was 'too late.' "[73]

From prison Snow prepared "a habeas corpus petition" seeking release "on the ground that he had been denied the due process guaranteed by the Fourteenth Amendment." The state court dismissed his petition for failure to "show any unconstitutional deprivation of Snow's rights." The case being now before the U.S. Supreme Court, the question asked exam takers to "[d]iscuss the issues and decide the case."

Seven years would pass before a unanimous U.S. Supreme Court, in *Gideon v. Wainwright*,[74] held that the Sixth Amendment's guarantee of trial counsel for Deft, Snow and other indigent criminal defendants is a fundamental and essential right that the Fourteenth Amendment requires of the states. However, in the 1940s and '50s, and well before *Gideon*, indigent representation may have been grist for faculty-lounge discussions. The issue also likely surfaced on bar exams beyond California as the high court, beginning in the early 1950s, issued a series of decisions concerning indigent defense — invalidating convictions in some cases, upholding them in others — before *Gideon* largely settled the issue.

By the 1970s, questions related to possession or trafficking in drugs appeared, including marijuana, LSD, heroin and most recently, cocaine. These questions mostly dealt with admissibility of evidence. But one involved a student's privacy rights and whether she was properly adjudged to be a juvenile delinquent when her locker had been inspected after a water leak occurred on school property, marijuana cigarettes were found inside, and the student refused to disclose to whom they belonged.[75] The student sued, claiming that her Fourteenth Amendment rights had been violated, and examinees were asked "how should the Superior Court rule?"

In what seems to have been a direct window on the tumultuous and violent political climate of the middle decades of the twentieth century, two mid-century bar exam questions involved attempted or successful efforts to assassinate federal elected officials. A March 1966 question posited the assassination of the speaker of the House and asked whether Congress had the authority to pass a statute outlawing the murder of the president or anyone in line for succession to the presidency.[76] In July 1980, a question involved an attempted assassination of the president.[77] This 1980 question followed two separate assassination attempts on President Gerald Ford, in September 1975, and preceded the March 1981 attempt on the life of President Ronald Reagan by less than a year.[78]

The Modern Federal Government Emerges

The New Deal legislation aimed at reviving the U.S. economy and alleviating the widespread Depression-era

69. Mar. 1971, Ques. 11.
70. Feb. 1972, Ques. 6.
71. (1961) 367 U.S. 643.
72. Oct. 1948, Ques. 13.
73. Mar. 1956, Ques. 9.
74. (1963) 372 U.S. 335.
75. Feb. 1972, Ques. 6.
76. Mar. 1966, Ques. 16. This question followed the 1963 assassination of President John F. Kennedy.
77. July 1980, Ques. 1. The question was actually about whether the private citizen who grabbed the gun and saved the president's life had a cause of action for defamation when the news media mis-reported that he had, years earlier, been convicted of statutory rape.
78. The other interesting cases under this topic involved the modern dangers of texting while driving. In one question, the issue posed one of proximate cause for injuries resulting from an accident caused when the texting driver lost control of his car. July 2017, Ques. 5. The other presented ethical questions about attorneys who represented various parties after one was hit by a car driven by a person who was texting while driving. July 2013, Ques. 1.

poverty profoundly restructured the relationship between states and the federal government. Signature New Deal initiatives like creation of the Federal Deposit Insurance Corporation and Social Security decisively shifted power to Washington and greatly expanded the presence of the federal government in the lives of ordinary Americans. These initiatives were controversial then and concerns about the federal government's size and clout have gained renewed purchase today. That debate over the reach of Congress, the president, and regulatory agencies found their way onto the California Bar Exam is unsurprising.

A handful of exam questions that clearly keyed off New Deal legislation appeared from 1938 into the 1950s, generally asking applicants to assess the constitutionality of various measures, real and hypothetical. In the first such question,[79] a preposterous bill introduced in Congress proposed creation of a "Recovery Committee" composed of current and former senators and representatives, the then and immediate ex-president as well as the defeated presidential candidate who received the "second largest popular vote." The Committee had power to act when Congress was between sessions. Its mandate was "to do everything necessary and appropriate to promote the most rapid and effective economic recovery of the nation; to make any change or further provision in the administration of the laws of the United States" to advance that goal; and, importantly, "to coordinate or suspend the operation, until the convening of the next session of Congress, of all the laws of the United States affecting the nation's economic welfare."

Test takers were to assume this legislation passed and determine, among other questions "what problems of constitutional law [were] involved and what decisions should be rendered" in a lawsuit by a federal taxpayer to enjoin the Committee from spending its allotted funds. The composition and mandate of this fictional Recovery Committee was outlandish, of course, but we suspect it reflected the genuine, if hyperventilated anxieties that accompanied the momentous government realignment then underway.

Most other questions of this sort were far more sober, generally requiring test takers to parse the application of actual legislation. A 1940 example:[80] The Federal Fair Labor Standards Act of 1938[81] set minimum wages and maximum hours for employees marketing or producing goods for sale "among the several states or from any state to a place outside thereof." After the federal committee with authority over the lumber-milling industry raised the minimum hourly wage to 40 cents, the "Redwood Lumber Mill Co." in California refused to comply. That entity, whose timber came entirely from California forests, shipped "only 40 percent" of its products out of state. The question asked, "Is the order as applied to the Redwood Lumber Mill Co. constitutional?"

Spinsters, Servants, and Norman Mailer

Time passes; language and societal norms evolve. In the current moment, we parse gendered pronouns, single out epithets not be uttered, and debate how to identify ethnic groups: Latino or Latinx? African-American or black, or Black? The language in California's exam hypotheticals, and likely on those of other states, serendipitously opened another window into broad societal changes during the twentieth century, particularly involving gender and race.

Terminology in many of the questions before 1970s was at best quaint and stereotypical or, at worst, painfully bigoted and insensitive, with frequent mentions of "servants," "bachelors," "spinsters," "illicit relationships," and "illegitimate children." Women in consensual but unmarried sexual relationships were usually "mistresses."

The questions also tracked a gradual acceptance of unmarried pregnant women and a more benign attitude toward sex generally. Well into the 1960s, bar exam questions treated unwed pregnancies as a source of shame and desperation, driving more than one woman to the point of suicide. A 1972 question portrayed an unmarried woman as susceptible to blackmail when someone threatened to reveal that she had undergone an abortion. But by 1986, a question involved the effectiveness of oral contraceptives by a married woman, absent any finger wagging. More recent questions included mention of sex education taught in schools, rock bands that played at music festivals, and, by 2011, people playing the lottery. This is a far cry from the hypothetical 1966 student who was expelled for having contracted a venereal disease.[82]

During the 1970s, descriptions of women in fact patterns clearly reflected the profound changes in their opportunities and achievements. Early on, exam questions referred to "office girls."[83] But beginning in the 1990s, the hypothetical women were executives,[84] a labor union president,[85] business owners,[86] a medical student,[87] and attorneys.[88]

The "Women's Lib" question on the February 1972 exam is worth special consideration, both as an indicator of the changing times and an obvious crib from the news. Fifty years on, the tone of the question not only seems insensitive in the extreme, but also troubling

79. Mar. 22, 1938, Ques. 18.
80. Oct. 7, 1940, Ques. 9.
81. 29 U.S.C. § 203.
82. Mar. 1966, Ques. 27.
83. Feb. 1972, Ques. 13.
84. July 1990, Ques. 6; Feb. 2002, Ques. 3; July 2015, Ques. 5.
85. Feb. 2003, Ques. 4.
86. July 2005, Ques. 3; Feb. 2006, Ques. 3; Feb. 2009, Ques. 1; Feb. 2013, Ques. 4.
87. Feb. 2019. Ques. 3.
88. Feb. 2005, Ques. 4.

in that the 1972 bar examiners did not anticipate that the hypothetical would be disturbing to the increasing numbers of women by then taking the exam. Here is the beginning of that question:

> Norm is a well-known author who gave a lecture at a private college. During the question period following the lecture, one of his answers about "Women's Lib" was as follows:
>
> "The Women's Lib movement is asinine. One trouble is that none of them have any sense of humor. Some of the top leaders are obvious lesbians who don't know why the Almighty made men and women physically different. One of the leaders at this college is a high school dropout once arrested for peddling dope."
>
> After this outburst, pandemonium reigned in the lecture hall. Polly, a leader in the movement at the College, was so incensed that she rushed to the platform and would have struck Norm had she not been forcibly restrained.
>
> The college student newspaper, "The Spectator," reported the episode, but inaccurately stated that Polly had actually hit Norm, that "blood gushed from his temple" and that Norm had accused Polly of having been convicted of peddling dope. No reporter was present but the information was obtained by the newspaper from persons who attended the lecture.

The question ultimately asked whether Polly had any rights against Norm and against "The Spectator" newspaper. Contrast this hypothetical with the actual comments of author Norman Mailer, at a legendary panel discussion that took place at The Town Hall in New York City on April 31, 1971. " 'There is an element of women's liberation that terrifies me,' said Mailer from his podium in 1971. 'It terrifies me because it's humorless.' And such joyless absolutism, Mailer warned, would open society to totalitarian creep — from the left — until we've all got 'scrambled brains.' "[89]

Conclusion

At its 1950 annual meeting, the NCBE convened a panel to solicit suggestions concerning new "optional" questions for state exams.[90] Most of the panelists, prominent legal educators and bar examiners, proposed variations on traditional exam questions like contracts, wills and estates, and torts.

Wesley A. Sturgis, Yale Law School's dean, took a different tack, arguing that "our prospective lawyer" is "likely to find himself . . . called upon to take a position with respect to some matter of change or reform. He may become involved in the drafting and sponsoring of legislation, . . . administrative regulations or the like." To do that, Sturgis believed the bar exam should include questions in which "the breadth of intelligence and interest and the variety of skills of the candidate may be tested anew." After wrestling with such questions, he continued, "I should hope to note how often this candidate, after three years of training . . . has lifted his head above his casebook into some of the dynamic and changing problems which confront responsible lawyers and citizen lawyers throughout their lives."[91]

Our current moment presents no shortage of such "problems." Constitutional principles and norms thought long settled are now being upended in some quarters, individual rights reassessed, and the federal–state relationship challenged.

The ongoing debate over bar exam reform appropriately centers on identifying and testing the basic competencies that new lawyers need to practice. As a result, exams in California and other states now hew to narrower, less provocative questions focused on more mundane legal issues. Less often than in past decades are test takers asked to think about how the law *should* develop, given contemporary constitutional, moral, and societal realities.

Dean Sturgis didn't specify the questions that he believed could allow potential "lawyer citizens" to demonstrate their mettle. But as legal educators and bar examiners continue to explore changes to the test, they might look to the past.

As this article has illustrated, California's bar examiners may have considered a small part of their mission, particularly during the middle decades of the last century, as evaluating prospective "custodians of the Constitution." They tried to assess fitness to practice law, in part, by drawing examples from the consequential issues of the day. These provocative questions were a natural extension of themes then discussed in law school, including how to make America fairer and more equitable. As winds of change again blow, that's a goal worth remembering. ✯

89. Travis Diehl, "Norman Mailer v. Germaine Greer: How the Town Hall Row Still Rages," *The Guardian*, Mar. 31, 2017; *https://www.theguardian.com/stage/2017/mar/31/the-town-hall-affair-wooster-group-norman-mailer-germaine-greer#:~:text=%E2%80%9CThere%20is%20an%20element%20of,all%20got%20%E2%80%9Cscrambled%20brains%E2%80%9D* (as of Apr. 9, 2022).

90. California examinees were presented with optional essay questions (*e.g.,* "choose to answer 4 of the following 5 questions") until the 1970s.

91. *The Bar Examiner* published the panelists' remarks in a series of articles during 1950 and 1951. *See* Wesley A. Sturgis, "Should Bar Examinations Include Optional Questions?" *supra*.

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